SUBJECT INDEX

	Page
Petition for Writ of Certiorari	1
Summary Statement of Matter Involved	1
Jurisdictional Statement	4
Questions Presented	4
Reasons Relied on for Allowance of Writ	5
Prayer for Writ	5
Brief in Support of Petition for Writ of Certiorari	7
Opinions of Courts Below	7-9
Jurisdiction	8
Statement of Case	11
Specification of Error	11
Argument	11
Summary of Argument	
Point 1	11
Point 2	21
Point 3	21

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Peters v. Fogarty, 26 Atl. 855;

Randall v. Peerless Motor Car Co., 99 N.E. 221;

Wolfgram v. Town of Schoepke, 100 N.W. 1054;

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Terrell v. State, 166 NE 8, 89 Jud. App. 125;

State v. McBride, 19 Mo. 239;

People v. Martin, 171 Ill. App. 153;

Allen v. State, 85 Wisc. 22, 54 NW 999;

Carlin v. State, 184 NE 543, 204 Ind. 644; 23 C.J.S. 1109, 1410; 23 C.J.S. 1110, 1412; 23 C. J. S. 1112, 1413;

Com. v. Townsend, 5 Allen 216;

Cook v. State, 60 Ala. 39;

Williams v. State, 44 Ill. 478;

Grace v. U. S., 4 F. (2d) 658, Certiorari denied 45 St. Ct. 637, 268 U.S. 702, 69 L. Ed. 1165;

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Sixth Amendment to the Constitution of the United Staes

Fourteenth Amendment to the Constitution of the United States

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

LEE YOUNG, LEE DEER, RALPH L. POLK, *Petitioners and Appellants below*

vs.

UNITED STATES OF AMERICA, *Appellee below.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable FRED M. VINSON, *Chief Justice* of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

SUMMARY STATEMENT OF MATTER INVOLVED

An indictment containing five counts was returned to the United States Court for Kansas against each appellant, charging in the First Count a conspiracy to carry on the business of wholesale liquor dealers, in violation of Section 88, Title 18, United States Code; the Second Count charged that while engaged in carrying on the business of liquor dealers the defendants

wilfully failed to pay the special tax for such occupation to the Collector of Internal Revenue, in violation of Section 3253, Title 26, United States Code; the Third Count charged that while engaged in carrying on such business the defendants purchased and received distilled spirits in quantities greater than twenty gallons from persons other than an authorized rectifier of distilled spirits, in violation of Section 2860, Title 26, United States Code; the Fourth Count charged that while engaged in carrying on such business, the defendants failed, neglected and refused to keep records in the form prescribed by the Commissioner of Internal Revenue, in violation of Section 2857, Title 26, United States Code; and the Fifth Count charged that while engaged in carrying on such business, the defendants failed, neglected and refused to place and keep posted conspicuously on the outside of the place or the places in which they conducted the business a sign reading, "Wholesale Liquor Dealer," in violation of Section 2831, Title 26, United States Code.

In the trial in the District Court, William A. Burch, William R. Herndon, Rex Markley, and Dean Pricer were tried with the above named three appellants; William A. Burch entered a plea of guilty; William R. Herndon, Rex Markley, and Dean Pricer were acquitted on all counts; the defendant Young was found guilty on the First, Third and Fourth Counts; the defendent Deer was convicted on the First, Second, Third and Fifth Counts; and the defendant Polk was convicted on the Second and Fifth Counts. Motions for new trial were denied, sentences were imposed, and notices of appeal were lodged on behalf of the appellants, Young, Deer, and Polk. After perfection of the appeal and before the record had been designated for printing, ap-

pellants discovered new evidence, material for a new trial, and moved the District Court to request the Circuit Court of Appeals for the Tenth Circuit to remand the cause to the District Court for further proceedings upon their motion for a new trial. They called to the District Court's attention irregularities on the part of the jury in arriving at its verdict, in the nature of a mistaken verdict. Said motion was denied by the District Court and thereafter each appellant filed a further motion in the United States Circuit Court of Appeals for the Tenth Circuit to remand the cause to the District Court for further proceedings upon motion for a new trial, and made a part of said motion the affidavit of each and every juror, indicating that the verdict was reached by means other than by a fair expression on the part of all jurors and that the verdict was a mistaken verdict. Said motion to remand to the District Court was argued in the United States Circuit Court of Appeals for the Tenth Circuit and was on the 10th day of July, 1947, severally denied. In the opinion denying the motion to remand, the Circuit Court of Appeals for the Tenth Circuit held, among other things, that jurors are competent witnesses for the purpose of showing that through mistake respecting the substance of the verdict in the court, it was not the verdict on which agreement was actually reached in the jury room; that appellants did not ask to have the causes remanded in order that the District Court could reform the verdicts so that they would correctly express the agreement actually reached by the jury, but incorrectly expressed in the verdicts as returned in open court, and then enter new judgments on the corrected verdicts. Upon said premise the Court refused to remand the cause to the District Court for further proceedings upon the motion for a new trial.

JURISDICTIONAL STATEMENT

Petitioners contend that the Supreme Court has jurisdiction to review the judgment of the United States Circuit Court of Appeals, Tenth Circuit, herein questioned, because the petitioners are being deprived of their liberty in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States in that petitioners are being deprived of their liberty without due process of law and without receiving equal protection of the laws afforded them by the Constitution of the United States and its amendments, and jurisdiction may vest in this Court by certiorari as provided by 28 U.S.C. 347, as hereinafter set forth.

QUESTIONS PRESENTED

The questions herein presented are:

1. Did the United States Circuit Court of Appeals for the Tenth Circuit err in denying appellants' motion to remand to the District Court for further proceedings upon motion for new trial?

2. In a criminal case, can the trial court correct or reform a mistaken verdict 28 days after the jury has been discharged, by means other than granting a new trial?

3. Must an accused, who has been inadvertently convicted (error discovered 28 days after jury discharged) by a jury on a count in an indictment of which they intended to acquit him, submit to the trial court entering a verdict of guilty on another count of the same indictment, on which the jury inadvertently acquitted him, or be denied a new trial without contravening the rights

afforded him by the Fifth, Sixth and Fourteenth amendments to the Constitution of the United States?

REASONS RELIED ON FOR THE ALLOWANCE OF WRIT

1. The United States Circuit Court of Appeals for the Tenth Circuit has decided a Federal question in a way probably in conflict with applicable decisions of other United States Circuit Courts of Appeal and of this Court. Said Court has so far departed from the accepted and usual course of jurisdictional proceedings and has so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision.

2. Said Court's decision deprives these appellants of their liberty in violation of the rights afforded them under the Fifth, Sixth and Fourteenth amendments to the Constitution of the United States.

WHEREFORE, your Petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court had in the case numbered and entitled on its docket, May Term 1947, No. 3475, *Lee Young, Appellant, vs. United States of America, Appellee;* No. 3476, *Lee Deer, Appellant, vs. United States of America, Appellee;* No. 3477, *Ralph L. Polk, Appellant, vs. United States of America, Appellee;* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of

said United States Circuit Court of Appeals, Tenth Circuit, be reversed by the Court and for such further relief as to the Court may seem proper.

Dated August 4, 1947.

AUSTIN M. COWAN
EDWARD ROONEY
A. D. WEISKIRCH
Counsel for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

LEE YOUNG, LEE DEER, RALPH L. POLK, *Petitioners and Appellants below,*

vs.

UNITED STATES OF AMERICA, *Respondent and Appellee below.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable FRED M. VINSON, *Chief Justice* of the United States, and the Associate Justices of the Supreme Court of the United States:

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF COURT BELOW

The opinion in the United States Circuit Court of Appeals for the Tenth Circuit is reported in ————

JURISDICTION

1. The date of the judgment of the United States Circuit Court of Appeals for the Tenth Circuit to be reviewed is July 10, 1947.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is 28 U.S.C., Para. 347, (Jud. Code 240, amended) styled "Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed:"

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.
>
> "(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

"(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section. (Mar. 3, 1891, c. 517, § 6, 26 Stat. 828; Mar. 3, 1911, c. 231, § 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, § 1, 43 Stat. 938.)"

3. The nature of this case and of the rulings below are such as to bring the case within the jurisdictional provisions relied on, for the following reasons:

(a) The defendants have not been afforded a hearing in the United States District Court for the District of Kansas after an appeal has been perfected to the United States Circuit Court of Appeals for the Tenth Circuit upon a motion for a new trial on the grounds of newly discovered evidence, material for a new trial, as provided by Rule No. 33 of the Rules of Criminal Procedure;
(b) The United States Circuit Court of Appeals for the Tenth Circuit has denied petitioners' motion to remand to the District Court for further proceedings upon motion for a new trial, as provided by the Rules of Criminal Procedure No. 33;
(c) Petitioners are being deprived of their liberty in violation of the Fifth, Sixth and Fourteenth amendments to the Constitution of the United States in that petitioners are being deprived of their liberty without due process of law, without enjoying a trial by an impartial jury and without receiving equal protection of the laws afforded them by the Constitution, its amendments, and the Federal Rules of Criminal Procedure.

The Fifth amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Section 1 of the Fourteenth amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. The cases believed to sustain said jurisdiction are as follows:

U. S. v. Gulf Refining Co., 268 US 542, 69 L. Ed. 1082, 45 S. Ct. 597; *U. S. v. Giles,* 300 US 41, 57 S. Ct. 340, 81 L. Ed. 493; *American Construction Co. v. Jacksonville, T. & K. W. R. Co.,* 148 US 372, 385, 37 L. Ed. 486, 491, 13 Sup. Ct. Rep. 758; *Forsyth v. Hammond,* 166 US 506, 513, 41 L. Ed. 1095, 1098, 17 Sup. Ct. Rep. 665.

STATEMENT OF THE CASE

A statement of the case has been made in the preceding petition on page 1, which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERROR

The United States Circuit Court of Appeals for the Tenth Circuit erred in denying appellants' motion to remand to the District Court for further proceedings upon motion for a new trial.

ARGUMENT

Summary:

POINT 1:

In support of our argument that the United States Circuit Court of Appeals for the Tenth Circuit erred in denying appellants' motion to remand to the District Court for further proceedings upon motion for new trial, we call to the Court's attention that on January 24, 1947, in a jury trial in the District Court of the

United States for Kansas petitioner Lee Young was found guilty of a conspiracy to carry on the business of a wholesale liquor dealer, in violation of Section 88, Title 18, U.S.C., as charged in the First Count of the indictment; guilty of purchasing and receiving distilled spirits in quantities greater than 20 gallons from persons other than an authorized rectifier of distilled spirits, in violation of Section 2860, Title 26, U.S.C., as charged in the Third Count of the indictment; and guilty of failing to keep records while engaged in the liquor business in the form prescribed by the Commissioner of Internal Revenue, in violation of Section 2857, Title 26, U.S.C., as charged in the Fourth Count of the indictment.

On the aforesaid date in the same trial, petitioner Lee Deer was by the jury convicted of a conspiracy to carry on the business of a wholesale liquor dealer, in violation of Section 88, Title 18, U.S.C., as charged in the First Count of the indictment; guilty of wilfully failing to pay the special tax as a liquor dealer to the Collector of Internal Revenue, in violation of Section 3253, Title 26, U.S.C., as charged in the Second Count of the indictment; guilty of purchasing and receiving distilled spirits in quantities greater than twenty gallons from persons other than an authorized rectifier of distilled spirits, in violation of Section 2860, Title 26, U.S.C., as charged in the Third Count of the indictment; and guilty of failing, while engaged in the liquor business, to place and keep posted on the outside of a place of business a sign reading "Wholesale Liquor Dealer," in violation of Section 2831, Title 26, U.S.C., as charged in the Fifth Count of the indictment.

Petitioner Ralph L. Polk in the trial on the aforesaid date was convicted of failure to pay the special tax,

while engaged in carrying on the business of a liquor dealer, to the Collector of Internal Revenue, in violation of Section 3253, Title 26, U.S.C., as charged in the Second Count of the indictment; and guilty of failure to post a sign reading "Wholesale Liquor Dealer", in violation of Section 2831, Title 26, U.S.C., as charged in the Fifth Count of the indictment.

Petitioners each within the time provided by the Rules, filed motion for a new trial, which included, among other grounds, that the verdict was decided by a means other than by a fair expression of opinion on the part of all jurors; each petitioner's motion for a new trial was argued to the Court and was denied on February 4, 1947; petitioners were then sentenced upon the counts above enumerated and each filed his notice of appeal to the United States Circuit Court of Appeals for the Tenth Circuit on February 6, 1947, and complied with the rules of Criminal Procedure pertaining thereto.

On February 21, 1947, which was seventeen days after petitioners' motion for a new trial was denied by the trial court and the same period of time after sentence, petitioners first learned that the verdict of the jury was decided by a means other than by a fair expression of opinion on the part of all jurors, and made appearance before the trial court on March 11, 1947, asking the trial court to request the United States Circuit Court to remand the cause to the District Court for a further hearing upon motion for a new trial, on the grounds of newly discovered evidence, material for a new trial. Said motion was denied by the District Court upon the premise that by virtue of the appeal having been perfected, jurisdiction was then vested in the United States Circuit Court of Appeals, as provided by Rule 33 of

the Rules of Criminal Procedure, and the trial court indicated it would proceed no further with a new trial except in the event the United States Circuit Court of Appeals so ordered.

Thereafter and on or about the 27th day of March, 1947, each petitioner filed in the United States Circuit Court of Appeals for the Tenth Circuit a motion to remand to the District Court for further proceedings upon a motion for a new trial on the ground that the verdict of the jury was decided by means other than by a fair expression of opinion on the part of all jurors, and in support of said motion filed the affidavit of each and every juror stating in substance that the verdict as rendered was a mistaken verdict.

Summarizing the affidavits, we ascertain that each juror was confused as to the various counts set forth in the indictment. The jurors thought when they were deliberating on the guilt or the innocence of the petitioners that Count I in the indictment, the conspiracy count, was Count V, which was failure to post a sign styled "Wholesale Liquor Dealer", and, vice versa, each juror thought that Count V was the conspiracy count. The mistake was very logically made, as the procedure for a trial in the United States District Court was quite unusual in the following aspects: The indictment was not sent into the jury room; the Court instructed in writing and sent the written instructions into the jury room; the Court in its written instructions did not instruct chronologically the order of the counts as set forth in the indictment, and in paragraph five of the written instructions, referred to the conspiracy count which was, as heretofore indicated, Count I in the indictment.

From the context of the affidavits it is apparent that the jury returned a verdict of guilty against the petitioner, Ralph L. Polk, finding him guilty of selling whiskey at wholesale, when as a matter of fact it intended to acquit him of that charge and to convict him of the conspiracy. By the same token, the jury returned a verdict against the petitioner, Lee Young, finding him guilty of a conspiracy when in fact it intended to acquit him of a conspiracy and find him guilty of failure to pay tax as a liquor wholesaler. It follows as a matter of logic that the jury made the same mistake in arriving at its verdict on the charges preferred against Lee Deer.

When petitioners' motion to remand to the District Court for further proceedings upon motion for new trial was argued in the United States Circuit Court of Appeals, the affidavit of each and every juror was presented and it was called to said Court's attention that the matters set forth in the affidavits were not within the knowledge of the petitioners at the time each presented his motion for a new trial and that the matters set forth therein should have been considered by the District Court in motion for a new trial on the grounds of newly discovered evidence, material for a new trial, so that petitioners would not be deprived of a fair and impartial trial and so that the District Court could rule upon questions of fact and law therein raised so that errors, if any, could be considered by any subsequent appellate court, and petitioners were entitled to that right or they would be deprived of a fair and impartial trial as afforded them by the Fifth and Fourteenth amendments to the Constitution of the United States and the Rules of Criminal Procedure.

It should be particularly noted that the mistaken verdict as evidenced by the affidavits was called to the

attention of the trial court and the court attaches the morning after the trial in the District Court, and neither the petitioners nor their counsel were apprized by the Court or any court attaches accordingly, and first ascertained that there had been a mistaken verdict some 28 days after the trial of the petitioners in the District Court.

In the United States Circuit Court of Appeals counsel for petitioners were called upon to argue the question if the affidavits of the jurors were admissible in evidence to impeach the verdict of the jury. Possibly the term "impeach the verdict" is a misnomer. An examination of the definitions of "impeach" indicates that the word "impeach" when used in reference to a witness signifies "to discredit or to show that he is unworthy of belief." "To impeach" as applied to a person is "to accuse; to blame; to censure him." It includes the imputation of wrong-doing or unfaithfulness in the discharge of a duty. In the law of evidence, which is probably most properly applicable here, the word "impeach" means to call in question the veracity of a witness or the adducing of proof that a witness is unworthy of belief. (Words and Phrases, Vol. 20, pages 192-3 and cases there cited; *White* and *N.Y.C.* and *St. L. R. Co.* 42 NE 456, 142 Ind. 648; *Boyant v. Glidden,* 36 Me. 36; *Johnson v. Belk-McKnight,* 198 SE 395.)

The meaning of the word "verdict" is a "true saying," and is supposed to be and ought to be a deliberate conclusion of the mind of *each* and *every* juror. A verdict must be the *unanimous* decision made by a jury and reported to the court, and is a substantial right. (*Anthony v. Anthony,* 29 SE 923; *Campbell v. Granite,* 42 A 228, 92 Me. 90; *Sitterson v. Sitterson,* 131 SE 642, 51 A. L. R. 760; In re *Suggs Will,* 140 SE 604; *Finance*

Corp. v. Jones, 166 SE 504; *Union Pac. v. Connolly,* 109 NW 368; *Smith v. Paul,* 45 SE 348; *Williams v. Pressler,* 65 P. 934, 11 Okl. 122; *French v. Merrill,* 50 N.Y.S. 776, 27 App. Div. 612.)

In the instant case, in light of the affidavits, do we have a verdict? Certainly the purported verdict returned into court was not a true saying of the jury. It was not the deliberate conclusion of the mind of each and every juror and in no sense was it unanimous. Further, are we trying to impeach the purported verdict? We are not trying to discredit the jurors nor to show what they were doing unworthy of belief. We are not accusing, blaming or censuring them, nor imputing any wrong-doing or unfaithfulness in the discharge of their duty, and we are not questioning their veracity. Such an error can certainly be corrected by the Court in a motion for a new trial.

We have argued the above not to be disrespectful to the Court nor criticize the question submitted, and realize that in cases of similar import most all of the decisions refer to the term "impeach the verdict of a jury." We are unable to find a case where the unusual circumstances presented in this case have existed, as for example, in the ordinary case, there will be affidavits of one or two jurors presented to show that they misunderstood the verdict that was being returned or that they were prejudiced or biased by some outside influence, and certainly in that type of a matter the term "impeachment of a verdict" is apropos. However, for the purpose of this brief we will assume that the term "impeachment of a verdict" is not a misnomer and will attempt to justify our request to remand this case to the District Court for further proceedings on a new trial.

The rule on the subject of "affidavits of jurors impeaching their verdict" has varied measurably over a period of years. Prior to 1785 a juror's testimony was often received. However, it was always received with great caution. That ruling was almost universally followed in England and in this country. Subsequently, by numerous State statutes, jurors' affidavits as to an overt act of misconduct which was capable of being controverted by other jurors, was made admissible, and, of course, the argument in favor of receiving such evidence is not only very strong but absolutely unanswerable when looked at solely from the standpoint of the private party who has been wronged by such misconduct. On the other hand, we can understand where tampering with a jury might open the door to pernicious arts and fraud and that the practice of permitting a juror to impeach his verdict would be replete with dangerous consequences. It could lead to great abuses and verdicts generally would be unsafe.

We will readily concede that the general rule is that affidavits of jurors will not be considered as to what occurred during the deliberations of the jury, for sound public policy prohibits the impeachment of a verdict by a juror. (*Black v. U.S.* 264 U.S. 580; *Walsh v. U. S.* 215 U. S. 609; *Johnson v. Hunter,* 144 Fed. (2d) 565.) However, there are exceptions, as was expressed in the case of *U. S. v. Reid,* 53 U.S. (12 How.) 361, and discussed in Housel & Walser, on "Defending and Prosecuting Federal Criminal Cases", 2nd Ed. at page 668 as follows:

> "The opinion thus indicates that public policy which forbids the reception of the affidavits, depositions or sworn statements of jurors to impeach their verdicts may in the interest of justice create

an exception to its own rule, while at the same time the necessity of great caution in the use of such evidence is enforced."

The *U. S. v. Reid* case, supra, has been followed to our knowledge in at least three other United States Supreme Court decisions and numerous Federal and Circuit Court decisions, to-wit:

Mattox v. U.S., 146 U.S. 140; *Hyde v. U.S.*, 225 U.S. 347; *McDonald v. U.S.*, 238 U.S. 268; *Morse v. Montana Ore Co.*, 105 F. 337; *Charlton v. Kelly*, 156 F. 433; *Ding v. U.S.*, 247 F. 12; *McHenry v. U.S.*, 276 F. 761; *Grenshaw v. U.S.*, 116 F. (2d) 737; *U. S. v. Falbo*, 135 F. (2d) 464; *Bratchen v. U.S.*, 149 F. (2d) 742.

In the Reid case, supra, affidavits of jurors were offered in evidence to establish the reading of a newspaper report of the evidence which had been given in the case on trial, but both deposed that it had no influence on their verdict. Mr. Chief Justice Taney, delivering the opinion of the Court, said in substance that there is presented a question of whether the affidavit of jurors impeaching their verdict ought to be received. It would, perhaps, not be safe to lay down any general rule on this subject. Unquestionably such evidence should always be received with great caution, but cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice. A similar rule of law was stated in *Mattox v. U. S.*, cited supra, and while in very few instances affidavits have been received by jurors to impeach their verdict, there have been instances where it would be impossible to refuse them without violating principles of justice, and we think, as a matter of justice in this case, where there is

no dispute as to what actually happened, where a mistake was existent and all of the jurors have so sworn, that we come within the exception to the general rule.

In the United States Circuit Court of Appeals for the Tenth Circuit, the Court received and considered the affidavit of each and every juror as evidence, and in rendering its opinion, said among other things:

> "But jurors are competent witnesses for the purpose of showing that through oversight, inadvertence, or mistake respecting the substance of the verdict into court, it was not the verdict on which agreement was actually reached in the jury room. *Hamburg-Bremen Fire Insurance Co. v. Pelzer Manufacturing Co.*, 76 F. 479; *Freid v. McGrath*, 135 F. (2d) 833; *Dalrymple v. Williams*, 63 N.Y. 361, 20 Am. Rep. 544; *Peters v. Fogarty*, 26 Atl. 855; *Randall v. Peerless Motor Car Co.*, 99 N.E. 221, *Wolfgram v. Town of Schoepke*, 100 N.W. 1054; *Carlson v. Adix*, 123 N.W. 321; *Caylat v. Houston East & West Texas Railway Co.*, 252 S.W. 478; *Moulton v. Staats*, 27 Pac. (2d) 455."
>
> "But appellants do not seek to have the causes remanded in order that the district court may reform the verdicts so that they will correctly express the agreement actually reached by the jury but incorrectly expressed in the verdicts as returned into open court and then enter new judgments upon the corrected verdicts."

From the above quoted portion of the opinion, it is glaringly apparent that petitioners' motion to remand was denied for the reason that petitioners did not seek to have the cause remanded so that the District Court could reform the verdicts so that they would correctly express the agreement actually reached by the jury, but incorrectly expressed by the verdict as returned into

open court, and have new judgments entered upon the corrected verdicts. With that reasoning we are not in accord for the following reasons:

POINT 2:

The trial court after a lapse of 28 days after discharge of the jury is without authority in law to reform or correct the verdict; that function is solely for a jury, provided that the jury could have been recalled within a very short period of time after its discharge and before it had been permitted to intermingle with the public. In support thereof we call to the Court's attention the decisions of *Terrell v. State,* 166 NE 8, 89 Jud. App. 125; *State v. McBride,* 19 Mo. 239; *People v. Martin,* 171 Ill. App. 153; *Allen v. State,* 85 Wisc. 22, 54 NW 999; *Carlin v. State,* 184 NE 543, 204 Ind. 644; 23 C.J.S. 1109, 1410; 23 C.J.S. 1110, 1412; 23 C.J.S. 1112, 1413; *Com. v. Townsend,* 5 Allen 216; *Cook v. State,* 60 Ala. 39; *Williams v. State,* 44 Ill. 478; *Denham v. Com.,* 84 SW 548, 119 Ky. 508, 27 Ky. Law Rep. 171; *U. S. v. Walkins,* Fed. Case No. 16,649, 3 Cranch. C.C. 441, 3 D.C. 441.

The decisions supra hold without question that the conviction of a defendant must be founded upon the verdict of the jury and not upon the verdict of a court.

POINT 3:

Further, it is the contention of the petitioners that when a verdict is a mistaken verdict (as the appellate court has found it to be), it is within the province of the court to have it corrected to conform to the actual finding of the jury in open court by allowing the jury to return to correct it, but in no instance should the jury be recalled to correct a mistaken verdict except within a close proximity in time after its discharge and

before it leaves the court house and mingles with the public. *Grace v. U. S.,* 4 F. (2d) 658, Certiorari denied 45 St. Ct. 637, 268 U.S. 702, 69 L. Ed. 1165; *Jay v. U.S.,* 35 F. (2d) 553; *Summers v. U. S.,* 11 F. (2d) 583, Certiorari denied 46 S. Ct. 632, 271 U. S. 681, 70 L. Ed. 1149; Abbott's Trial Brief, Criminal causes p. 730; *Brister, et al v. State,* 26 Ala. 132; *Levells v. State,* 32 Ark. 585; *Jackson v. State,* 45 Ga. 198; *Grant v. State,* 14 So. 757, 33 Fla. 291, 23 L.R.A. 723; *Taggart v. Com.,* 46 SW 674, 104 Ky. 301, 20 Ry. Law Rep. 493.

From the above quoted portion of the opinion of the United States Circuit Court of Appeals for the Tenth Circuit, it appears that the petitioners are being deprived of their rights guaranteed unto them by the Fifth, Sixth and Fourteenth amendments to the Constitution of the United States because they have not sought to have the verdict as to each corrected or reformed. In this connection we earnestly urge error and contend that the only means of reforming or correcting a verdict in a criminal case is by pursuing the legal remedy that we have sought, namely, motion for new trial. *Brown v. State,* 150 Ga. 585, 104 SE 428; *Claughton v. State,* 175 SE 470, 179 Ga. 157; *Hughes v. State,* 127 SE 109, 159 Ga. 818, 269 U.S. 539, 70 L. Ed. 401, 270 U. S. 665, 70 L. Ed. 788; In re *Brown,* 139 Kan. 614.

The petitioners do not feel remiss in the trial of this case and do feel that had the trial court or the court attaches called the matter of a mistaken verdict to their attention when it was first learned, namely the morning after the trial, with the verdict rendered about 6:00 p.m., the jury could possibly have been reimpaneled and could have been by the trial court sent back to the jury room to correct the mistake. We recognize there is some question of law regarding the above statement, be-

cause, ordinarily, after a jury has been discharged and has been permitted to leave the court house and mingle with the public, they cannot be recalled. However, that certainly could have been done with consent of the accused. It was not done, however, and the matter cannot now be done except by a new trial by virtue of the laws and rules of criminal procedure. Petitioners to date have not had a fair and impartial trial and have not been afforded the rights guaranteed to them by the Fifth, Sixth and Fourteenth amendments to the Constitution of the United States, and if the verdict and sentence of the court as pronounced stands, it means that the petitioners go to the penitentiary for crimes which they did not commit and for crimes of which the jury did not intend to convict them. Further, if they go to the penitentiary on a reformed verdict, they go on the verdict of a court and not on a verdict of a jury, in accordance with their constitutional guarantees.

In conclusion, we respectfully submit that this case is one calling for exercise of this court of supervisory powers by issuing a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

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